REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

A BROWN CO., INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6524

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
NOV 05 2003

x - x

D E C I S I O N

This case involves an assessment for deficiency income tax for the year 1996 in the amount of THREE MILLION FOUR HUNDRED ONE THOUSAND FOUR HUNDRED SEVENTY TWO AND 63/100 (P3,401,472.63) PESOS, inclusive of interests, surcharge and penalties.

The facts of the case have been jointly stipulated by the parties:

1. A. Brown Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at Xavier Estates, Upper Balulang, Cagayan de Oro City.

2. Respondent is the duly appointed Commissioner of Internal Revenue, vested by law in general to implement and enforce the provisions of the National Internal Revenue Code (NIRC), and he may be served summons and other legal processes at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

3. On December 24, 1999, Victorsons Trans Cargo System, Inc., (VICTORSONS) a corporation duly established under Philippine laws, with then principal office at Vicenta Street, Marick Subdivision, Cainta, Rizal, merged with petitioner A. Brown Co., Inc. (ABCI), with the latter being the surviving corporation. The merger is evidenced by a copy of the Plan and Articles of Merger and Reorganization, attached as Annex "A" of the petition, and same is admitted by the respondent to be the faithful reproduction of the original copy thereof.
4. The fact of merger was reported to the Bureau of Internal Revenue.

5. As per Annex "A", particularly the provisions of (II), (B), (h) thereof, ABCI shall be responsible for all the liabilities and obligations of VICTORSONS, the absorbed corporation as if ABCI had itself incurred such liabilities and obligations.

6. Sometime October 2000, ABCI learned that the Collection Division, BIR, Region 7, issued a Final Notice Before Seizure against VICTORSONS, allegedly because of unpaid Assessment on account of alleged deficiency income tax. The Final Notice Before Seizure is evidenced by Annex "B" of the petition, and respondent admits that same is a faithful reproduction of the original copy thereof.

7. Immediately thereafter, on October 13, 2000, ABCI wrote a letter to the Collection Division, BIR, Region 7, stating the fact of merger of VICTORSONS with ABCI and that no assessment or even a preliminary assessment notice were sent prior to the receipt of the Final Notice Before Seizure. The letter is evidenced by Annex "C" of the petition, and respondent admits that same is a faithful reproduction of the original copy thereof.

8. Acting on the said letter, the Collection Division, BIR, Region 7, forwarded to the Assessment Division, BIR, Region 7, the docket of the said case. The communication evidencing the forwarding the docket of said case to the Assessment Division is evidenced by Annex "D" of the petition, and respondent admits that same is a faithful reproduction of the original copy thereof.

9. On March 27, 2001, ABCI formally requested from the Assessment Division, BIR, Region 7, that it be given a copy of the Preliminary Assessment and the Assessment allegedly issued in said case, so that it could take the proper measures. The formal request is evidenced by Annex "E" of the petition, and respondent admits that same is a faithful reproduction of the original copy thereof.

10. On October 19, 2001, ABCI formally received the photocopies of the Preliminary Assessment and the Assessment issued against VICTORSONS. The fact of receipt by ABCI of the photocopies of the Preliminary Assessment and the Assessment itself was indicated in the docket of the case, wherein ABCI's representative was made to acknowledge receipt thereof by signing his name on both pages of Annex "E" and indicating the fact and date of their receipt.

11. On the other hand, the copies of the Preliminary Assessment, with the attached Details of Discrepancy/Disallowances, and the Assessment, with the attached Formal Letter of Demand and Details of Discrepancy, received by ABCI on October 19, 2001, are evidenced by Annexes "F". "F-1" and "F-2", and "G", "G-1" to "G-3" of the petition, and respondent admits that same are faithful reproductions of the original copies thereof.

12. On November 16, 2001, ABCI filed a protest to the Assessments issued against VICTORSONS. The copy of said Protest (without its Annexes) is

evidenced by Annex "H" of the petition, and respondent admits that same is a faithful reproduction of the original copy thereof.

13. On January 15, 2002, ABCI submitted to the BIR a letter indicating that the copies of all the relevant supporting documents to justify the Protest were already attached to the Protest. The copy of the aforesaid letter is evidenced by Annex "I" of the petition, and respondent admits that same is a faithful reproduction of the original copy thereof.

14. There is no formal action on the part of the BIR regarding the Protest, which was communicated to ABCI, prompting ABCI to institute this Petition for Review, pursuant to Section 228 of the Code.

Respondent, in his answer filed on October 11, 2002, claimed the following as Special and Affirmative Defenses, to wit:

5. The assessment for deficiency income and business taxes are valid and in accordance with law;

6. Assessments are prima facie presumed correct and made in good faith;

7. The burden of proof is upon the petitioner to prove that the assessment issued by the respondent is indeed null and void; and

8. All assessment and pre-assessment notices were issued and sent to the petitioner in accordance with well-established procedures.

As both the petitioner and respondent agreed to submit this case for decision upon the submission of their Joint Stipulation of Facts and Issues, in a resolution promulgated on July 1, 2003, the court considered the case submitted for decision after receipt of the parties' respective memorandum.

The issues we are tasked to resolve have been stipulated by the parties to be as follows:

(1) Whether or not Section 228 of the National Internal Revenue Code was complied with by the respondent, specifically the requirement that "should the Commissioner or his duly authorized representative finds that proper taxes should be assessed, the Commissioner or his representative shall first notify the taxpayer of his findings";

(2) Whether or not due process was afforded the petitioner when the respondent first sent to the petitioner a Final Notice Before Seizure, and only furnishing later to the petitioner copies of the preliminary assessment notice and

the assessment notice;

(3) Whether or not due process was afforded the petitioner when the respondent furnished it simultaneously with a copy of the preliminary assessment notice and the assessment notice;

(4) Whether or not the subject assessment has prescribed;

(5) Whether or not the final assessment is now due and demandable against the petitioner.

The issues being interrelated, the same shall be discussed jointly.

In support of its position, petitioner relied on Section 228 of the 1997 Tax Code, thus:

"**SEC. 228.** ***Protesting of Assessment.*** - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a pre-assessment notice shall not be required in the following cases:

x x x x x x x x x

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable." (Underscoring supplied)

Moreover, petitioner maintains that pursuant to the rule-making power of the respondent, Revenue Regulations No. 12-85, or the "Procedure Covering Administrative Protests on Assessments of the Bureau of Internal Revenue", Revenue Regulations No. 12-99, implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue taxes, among others, and Revenue Memorandum Order No. 37-94, which governs the "procedures on the preparation, approval and release of assessment notices and demand letters". were issued, pertinent provisions of which are quoted hereunder for easy reference, to wit:

REVENUE REGULATIONS NO. 12-85

"POST REPORTING NOTICE

Section 1. Post-reporting notice. - *Upon receipt of the report of findings, the Division Chief, Revenue District Officer or Chief, Office Audit Section, as the case may be, shall send to the taxpayer a notice for an informal conference before forwarding the report to higher authorities for approval. The notice which is Annex "A" hereof, shall be accompanied with a summary of findings as basis for the informal conference.*

In cases where the taxpayer has agreed in writing to the proposed assessment, or where such proposed assessment has been paid, the required notice may be dispensed with.

Section 2. Notice of Proposed Assessment. - *When the Commissioner or his duly authorized representative finds that taxes should be assessed, he shall first notify the taxpayer of his findings, in the attached prescribed form as Annex "B" hereof. The notice shall be made in writing and sent to the taxpayer at the address indicated in his return or at his last known address as stated in his notice of change of address.*

In cases where the taxpayer has agreed in writing to the proposed assessment, or where such proposed assessment has been paid, the required notice may be dispensed with.

Section 3. Time to Reply. - *Venue for Filing Reply -*

(a) Regional Office cases - The taxpayer shall reply within a period <u>of fifteen (15) days from receipt of the Pre-Assessment Notice</u>. In meritorious cases and upon written request of the taxpayer an extension may be granted within which to respond, but in no case shall the extension exceed a total of ten (10) days.

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Section 4. Examination of records. - *<u>In case the taxpayer responds to the notice within the above-prescribed period, he or his duly authorized</u>*

representative shall be allowed to examine the records of the case and to present his arguments in writing protesting the proposed assessment. Thereafter, the Commissioner or his authorized representative shall, on the basis of the evidence on record, decide whether or not to approve the report as a prelude to the issuance of the corresponding assessment notice.

ISSUANCE OF ASSESSMENT

Section 5. Failure to Reply to Pre-Assessment Notices; Issuance of Assessment. *- In the event the taxpayer fails to respond to the Pre-Assessment Notice within the above-prescribed period, or when the Commissioner or his duly authorized representative finds the response to be without merit, he should be informed of such fact and the report of investigation shall be given due course."*

REVENUE REGULATIONS NO. 12-99

Section 3. Due process requirement in the issuance of a deficiency tax assessment. -

3.1 Mode of procedures in the issuance of a deficiency tax assessment:

3.1.1 Notice for informal conference. - The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be, (in the case of Revenue Regional Offices) of by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of "Informal Conference," in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer or the Chief of the Special Investigation Division of the Revenue Regional Office, or the Chief of Division in the National Office, as the case may be, shall endorse the case with the least possible delay to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

3.1.2 Preliminary Assessment Notice (PAN). - If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed *assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN , he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties."*

3.1.3 *Exceptions to Prior Notice of the Assessment. - The notice for informal conference and the preliminary assessment notice shall not be required in any of the following cases, in which case, issuance of the formal assessment notice for the payment of the taxpayer's deficiency tax liability shall be sufficient:*

"(i) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax appearing on the face of the tax return filed by the taxpayer; or

"(ii) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

"(iii) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable for the taxable quarter or quarters of the succeeding taxable year; or

"(iv) When the excise tax due on excisable articles has not been paid; or

"(v) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

"3.1.4 Formal Letter of Demand and Assessment Notice. - The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void. The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and

(d) date of receipt thereof.

xxx xxx xxx xxx
(Emphasis supplied)

REVENUE MEMORANDUM ORDER 37-94

II. Policies

B. Pre-assessment notices, demand letters and assessment notices shall be based on the "Revenue Officers Audit Report (BIR Form 1717)" prepared by the investigating officer and reviewed by the duly designated reviewing offices (Assessment Divisions in the Revenue Regions for Regional Cases, and the Intelligence and Investigation Service for Tax Fraud Division cases).

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III. Procedures

A. Reports of Investigation -

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3. The report of investigation must include a duly accomplished "Revenue Officers Audit Report (BIR Form 1717)" which shall be the basis for the issuance of a pre-assessment notice, demand letter and assessment notice as the case may be. The reviewing office shall also consolidate in the aforementioned form any findings, corrections made during the review under the "Per Review" column.

C. Review of Reports of Investigation and Service of Pre-assessment Notices -

xxx xxx xxx xxx

2. The aforementioned reviewing offices, after having reviewed the report of investigation, shall send a pre-assessment notice to the taxpayer, indicating therein the basis of the assessment, and a definite time frame within which he may protest the same if he is not agreeable. If the taxpayer files his protest within the period prescribed in the aforesaid notice, the same reviewing offices shall likewise decide whether the protest conforms with existing requirements and whether or not to give due course to the protest. The reviewing office shall then inform the taxpayer in writing of the result of the resolution of his protest.

If the pre-assessment notice is not protested within the prescribed period, the reviewing office shall then issue a letter of demand and assessment notice to the taxpayer.

3. The "Revenue Officers Audit Report (BIR Form 1717)" prepared by

> *the investigating officer, as reviewed and corrected by the reviewing office, shall be the basis of the pre-assessment notice, the demand letter and assessment notice.*

Petitioner argues that in the present case, the records will show that the respondent miserably failed to comply with the requirements of the law and of the pertinent rules and regulations. According to petitioner, it is clear that what was first sent by the respondent to the petitioner sometime in October 2000 was the Final Notice Before Seizure and it was only in October 19, 2001, after petitioner made a formal request, that the latter was given simultaneously copies of the preliminary assessment and the assessment notices. Specifically, the mandatory requirement of prior notification before assessment was not afforded by the respondent to the petitioner. Petitioner thus concludes that these violations are deemed violations of the right of petitioner to due process, consequently, the subject assessments must be declared as null and void.

Petitioner likewise contends that the respondent's right to issue assessment for the said period has already prescribed considering that the subject assessment was released and sent beyond the three-year prescriptive period.

Respondent, however, claims that the specific requirements of procedural law mandated by the Tax Code had been clearly complied with and that after due examination of the records of the petitioner, the respondent had informed the former of the discrepancies in his tax payments to which it was also given the opportunity to rebut the same. Respondent further insists that the Final Notice Before Seizure was sent after the PAN and FAN had been issued; that the simultaneous receipt of the PAN and the FAN were results of request made by the petitioner's representative and was not in any way a voluntary act of the respondent; that the PAN and FAN are considered issued for the purpose of notifying petitioner of its tax liability and for which said liability attaches; and that the assessment issued against the petitioner had not yet prescribed and in fact, is now final and demandable.

We agree with the petitioner.

A careful examination of the records of the case would disclose the fact that indeed petitioner received the Final Notice Before Seizure before it was able to obtain copies of the Preliminary Assessment Notice and the Final Assessment.

Records show that respondent, on February 10, 2000, issued a Pre-Assessment Notice against Victorsons Trans Cargo System, Inc., assessing it of a total Income Tax Deficiency in the amount of Three Million Four Hundred One Thousand Four Hundred Seventy Two and 63/100 Pesos (P3,401,472.63), inclusive of interests and penalty charges (*p. 130, BIR Records*). Attached to the pre-assessment notice is the Details of Discrepancies/Disallowances (*Annex A, p. 128, BIR Records*). On March 10, 2000, a Formal Letter of Demand with the attached Assessment Notice was likewise issued by the Bureau of Internal Revenue against Victorsons (*pages 132 to 135, BIR Records*). Finally, on August 31, 2000, respondent issued and sent through registered mail the Final Notice Before Seizure dated April 14, 2000 to herein petitioner, which petitioner received on October 3, 2000.

Petitioner denied that it had ever received either or both the Pre-assessment Notice and the Formal Letter of Demand with attached Assessment Notice dated February 10, 2000 and March 10, 2000, respectively. It is, therefore, incumbent upon the respondent to prove by contrary evidence that petitioner received the subject assessment notices. However, after a careful scrutiny of the records presented, there is no evidence to prove that respondent sent the subject assessment notice to herein petitioner. Except for the allegation that the Final Notice Before Seizure was sent after the PAN and FAN had been issued, no evidence was presented by respondent to support his stand that petitioner received the said notices. There was no showing whether such notices were ever mailed to petitioner. What is only clear from the records is that respondent had issued both a pre-assessment notice dated February 10, 2000 and a formal demand letter with assessment notice dated March 10, 2000.

In the case of ***Republic vs. Court of Appeals and Nielson & Co., Inc., 149 SCRA***

351, the Supreme Court ruled that where the taxpayer makes a direct denial of receipt of a mailed demand letter, such denial shifts the burden on the Government to prove that such letter was indeed received by the taxpayer. Respondent's records failed to persuade this court that the PAN and the FAN were ever received by the petitioner on time. On the contrary, the court took notice of a short note between pages 127 and 128 of the BIR Records which stated:

> Ma'am,
>
> **VAT & EWT – no PAN**
>
> **The case was not immediately acted upon by Reviewer (Ethel Villareal) Discovered only after prescription by the supervisor.**
>
> MPA

Verily, respondent's allegation that "the issuance of the notices were made upon its execution and delivery through mail, as has been seasonably done" deserves scant consideration for what is obvious in the case at bar is that the Final Notice Before Seizure was received ahead of the PAN and the FAN. Accordingly, we agree with petitioner that respondent failed to comply with the notification requirement as provided for under Section 228 of the Tax Code when it issued the Final Notice Before Seizure prior to petitioner's receipt of the assessment notice.

With the above disquisition, this court can only conclude that petitioner was denied due process. "*(H)erein Respondent committed an arbitrary act tantamount to a violation of Petitioner's right to procedural due process when the former issued the assessment in question. Petitioner has assiduously denounced the lack of prior notice for an informal conference and a pre-assessment notice attending the issuance of the assailed assessment , as required under BIR Revenue Regulations No. 12-85 which was issued pursuant to Section 229 of the Tax Code, as amended. Inexplicably, records bear that Respondent did nothing to disprove Petitioner's alleged non-receipt of notices. Jurisprudence tells Us that it is incumbent upon the Respondent to prove by competent evidence that such notices were indeed received by Petitioner, xxx*" (***Caltex***

***(Philippines), Inc. vs. Commissioner of Internal Revenue**, CTA Case No. 5664, October 4, 2000*).

Respondent, in his effort to save his case, contends that petitioner had knowledge of the existence of a pending assessment against it that is why it was able to contest both the proposed assessment, as evidenced by letter-protest filed by petitioner on September 29, 1999 (*pages 110-115, BIR Records*) and the Final Notice Before Seizure.

We do not agree. It is to be noted that after petitioner's submission of the letter dated September 29, 1999, stating therein its objections to the proposed assessment, nothing was heard from the respondent until the issuance of the Final Notice Before Seizure. Under Section 228 of the Tax Code, *hereinbefore quoted*, the taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void. And within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, only then will the Commissioner or his duly authorized representative issue an assessment based on his findings. Clearly, the letter of respondent dated September 17, 1999 and received by the petitioner on September 20, 1999, informing the latter that after audit, it was found out that there is still due from petitioner the amount of P5,081,458.92, inclusive of increments, will not suffice to uphold the validity of the Final Notice Before Seizure when no Preliminary and Final Assessment Notices were even issued to petitioner.

Finally, having ruled that no assessment notice was received by petitioner prior to its receipt on October 3, 2000 of the Final Notice Before Seizure (sent through registered mail by respondent on August 31, 2000), it is clear that the said assessment had already prescribed, reckoned from April 15, 1997, the date of filing of petitioner's 1996 Annual Income Tax Return.

WHEREFORE, the Petition for Review is **GRANTED**. Assessment Notice No. 00055 issued by respondent against petitioner for deficiency income tax for the year 1996 in the amount of P3,401,472.63 is hereby declared null and void for having been issued out of time.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Judge

LOVELL R. BAUTISTA
Associate Judge

C E R T I F I C A T I O N

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge